

Replacement Justice on the United States Supreme Court: The Use of Temporary Justices to Resolve the Recusal Conundrum

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Introduction

CONSIDER THE FOLLOWING HYPOTHETICAL: the constitutionality of President Barack Obama's signature health care initiative, the Patient Protection and Affordable Care Act, has been considered by both the U.S. Courts of Appeals for the Fourth and the Eleventh Circuit. At issue is the constitutionality of the individual mandate, requiring Americans to carry health insurance coverage. The Fourth Circuit has upheld the mandate, while the Eleventh Circuit has invalidated it, finding no congressional power to compel the purchase of a private good under the Commerce Clause. The Supreme Court has accepted both cases and scheduled the issue for oral argument.¹ However, Justice Elena Kagan, newly appointed to the Supreme Court by President Obama, decides to recuse herself from hearing the case—out of an

* J.D., University of San Francisco School of Law, 2011. B.A., University of California, Berkeley, 2003. This Comment is dedicated to the memory of my late uncle, Eric Lamm. He was perhaps the first person to read the final printed copy of Volume 45, Issue 1 of the *USF Law Review* cover-to-cover—simply because it bore my name on the masthead—and he unconditionally supported everything I did. Eric had an encyclopedic mind and a curiosity that knew no bounds, and he invariably put the needs of others before his own. He would have been proud of this Comment, and I was proud of him. Eric died due to complications from cancer on January 26, 2011.

1. The U.S. Supreme Court has frequently accepted multiple cases that address the same or similar federal questions, consolidating them for oral argument. *See, e.g.*, *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (a Kansas case that was consolidated with *Briggs v. Elliott*, 130 F. Supp. 920 (E.D.S.C. 1952), *Davis v. County Board of Education*, 103 F. Supp. 337 (E.D. Va. 1952), and *Gebhart v. Belton*, 91 A.2d 137 (Del. 1952)). If, however, the Court were to only accept a health care case from one circuit, that would also be problematic. Because no affirmative action can be taken on a 4-4 tie, the outcome of the case would hinge on whether the Court accepted an appeal from a circuit where the mandate was upheld or was struck down—a seemingly arbitrary distinction determining a major constitutional issue.

abundance of caution, given that she was involved in administration policy during the contentious health care debate, and with a desire to avoid even the appearance of a conflict of interest. The eight remaining Justices find themselves bitterly divided, with the traditional four conservatives finding the law unconstitutional, and Justice Kennedy siding with the three remaining liberals on the Court to uphold it. The result is a 4-4 deadlock. As the country eagerly awaits a decision on this hotly contested issue, the U.S. Supreme Court instead, per its usual practice in such situations, issues a one-sentence per curiam opinion: “The judgments are affirmed by an equally divided Court.”

Such an outcome could throw the country into disarray. Because the U.S. Supreme Court can take no affirmative action on a tie vote, both the lower court judgments upholding and invalidating the health care law would be affirmed. The outcome would be a patchwork of laws across the country, creating a situation in which Florida residents would not be required to purchase health care while Virginia residents would face substantial federal fines if they did not. Other states would be left to the whims of their federal circuits, and the result would be that arguably the most significant federal law of the past quarter-century would be constitutional in some states but unconstitutional in others. Moreover, because the specific issue of a federal mandate for health insurance coverage would be unlikely to return to the Court again in a way in which Justice Kagan would not be recused, the issue would unlikely be resolved anytime in the near future. The Court and the country would be effectively paralyzed as to one of the most important political issues of our time.

This is precisely the issue that this Comment will address. Although the above hypothetical may seem improbable,² the U.S. Supreme Court has faced real issues posed by the problem of recusal-based tie votes, and the possibility of such a “nightmare scenario” lurks in the background each time a Justice faces the difficult decision of whether or not to recuse. This Comment will both trace the background of recusal-based tie votes and examine some of the proposed solutions to avoid these issues in the future. Part I will examine the history of and problems surrounding recusal-based tie votes. Part II will consider how both the lower federal courts and the state supreme

2. As discussed *infra* Part III.A.1., the lack of any mechanism to replace a recused Justice can have a significant impact on recusal decisions themselves. As Justice Scalia has acknowledged, the fact that recusal may result in a 4-4 tie is a reason not to recuse oneself, and Justice Kagan may very well heed that warning. *See* *Cheney v. U.S. Dist. Court*, 541 U.S. 913 (2004) (Scalia, J.).

courts deal with this issue, with a particular focus on the federal designation statutes and the alternative approach of the California Supreme Court. Part III will analyze three specific proposals for addressing this problem: the use of retired Supreme Court Justices, chief judges of the circuit courts of appeals, and a pool of all circuit judges as temporary replacements for recused Justices. Part IV will consider the constitutionality of each of these proposals, evaluating whether they are consistent with the One Supreme Court Clause, the Appointments Clause, and the meaning of “judicial office” under Article III.

While this Comment will acknowledge some specific policy and constitutional obstacles to the use of temporary replacement Justices, it ultimately argues that the need for certainty in the law is of paramount concern and that the use of designated Justices—most workably from a pool of sitting circuit court judges—is both constitutional and the most effective solution to this pressing issue.

I. The History and Problem of Recusal-Based Tie Votes

When the U.S. Supreme Court is short a Justice, the law does not currently provide for any procedure to replace her. This leaves the Court with an equal number of Justices and the very real potential of a tie vote. That result has generally arisen from two possible scenarios: the “long and indeterminate absence” of a Justice³ or a decision by one of the Justices to recuse herself due to a real or apparent conflict of interest.⁴ The first scenario manifests itself when a Justice takes time away from the Court to tend to other policy or personal matters, including health issues or when a vacancy is created due to retirement or death, and the Senate has failed to confirm the President’s nominee. For example, Justice Robert Jackson took time away from the Court to serve as Special Prosecutor at the Nuremberg War Crimes Trial.⁵ More recently, Chief Justice William Rehnquist missed forty-four oral arguments between being diagnosed with terminal thyroid cancer and his death in 2005.⁶ The second and more common scenario arises when a Justice, on her own accord, opts for recusal, fre-

3. William L. Reynolds & Gordon G. Young, *Equal Divisions in the Supreme Court: History, Problems, and Proposals*, 62 N.C. L. REV. 29, 32 (1983).

4. See Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643, 646 (2002).

5. Reynolds & Young, *supra* note 3, at 32 n.11.

6. Elaine Cassel, *Chief Justice Roberts’s Health, After His Recent Seizure: What We Know, What We Don’t Know, and What We May Never Know*, FINDLAW (Aug. 2, 2007), <http://writ.news.findlaw.com/cassel/20070802.html>.

quently necessary when a new Justice has worked on a case before she joined the Court. For example, Justice Elena Kagan, who served as U.S. Solicitor General before joining the Court, has recused herself from approximately one-third of the Court's cases during its most recent term.⁷ Likewise, Justice Thurgood Marshall, who also served as Solicitor General before joining the Court, recused himself in fifty-seven percent of all cases decided in his first term.⁸

Of course, a recusal or vacancy does not necessarily result in a tie vote since more than a third of Supreme Court cases are decided unanimously, and many more are decided by more than one vote.⁹ Between 1925 and 1982, there were only 123 "equal divisions" that resulted in a tie vote.¹⁰ Over that period, approximately seventy-five percent of the ties were caused by a recusal or temporary absence, while twenty-five percent were caused by a vacancy on the Court.¹¹ Yet even though the aggregate number of equal divisions over time may be small, each tie has the potential to create significant problems. First, the constitutionality or statutory interpretation of an entire regulatory regime can be left unresolved.¹² This represents the precise situation posed in the opening hypothetical, where if the Court deadlocks, there is no clear method to resolve the stalemate in the near-term. Second, tie votes create geographic disparities, as laws are enforced differently in the various circuits without any guidance from the Court.¹³ Although to some extent, this will always be the case—since the Supreme Court accepts a very limited number of cases—it is more significant in this context because these are cases on which the Court has already granted certiorari from its myriad petitions and thus

7. Tom Goldstein, *An Update on Recusal*, SCOTUSBLOG (Oct. 3, 2010, 9:36 PM), <http://www.scotusblog.com/2010/10/an-update-on-recusal>. As of October 2010, Justice Kagan had recused herself from twenty-four of fifty-two cases (or about forty-six percent). Goldstein estimates that she will recuse herself from twenty-eight of the approximately eighty-five cases the Court decides during its 2010 term (or one-third). *Id.*

8. *Id.*

9. SCOTUSblog *FINAL Stats OT09*, SCOTUSBLOG (July 7, 2010), <http://www.scotusblog.com/wp-content/uploads/2010/07/Final-Stats-OT09-0707101.pdf>.

10. Reynolds & Young, *supra* note 3, at 30. In a typical term, the Court will decide "fewer than one case by a 4-4 vote as a result of a recusal." Michael C. Dorf & Lisa T. McElroy, *Coming Off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court* 11 (Cornell Law Sch., Working Paper No. 11-07, 2011), available at <http://ssrn.com/abstract=1767333>; see also *infra* Part III.A.1 (discussing how the Court's relative lack of recusals may be due to the fact that some Justices may not recuse because of the lack of a replacement mechanism).

11. Reynolds & Young, *supra* note 3, at 36 n.34.

12. See *id.* at 31-32.

13. See *id.*

deemed appropriate and necessary for decision. Third, even if a tie in an individual case does not upset an entire regulatory regime or result in disparate adjudication of laws across circuits, it still may represent such an important issue that the lack of a decision works injustice on one or more of the parties.¹⁴

When the Court does divide equally, the settled practice is to simply affirm the lower court decision, frequently in a per curiam opinion. This is based on the premise that “no affirmative action can be had in a cause where the judges are equally divided in opinion as to the judgment to be rendered or order to be made.”¹⁵ Moreover, that affirmation is generally not accorded any precedential weight since it was not the result of a majority action. Justice Stephen Field noted that while the judgment is binding on the parties, the Court’s rule “prevents the decision from becoming an authority for other cases of like character.”¹⁶ This rule was later referenced in the federal judicial code,¹⁷ and while the rule is not expressly required by statute, Congress’s presupposition of its existence demonstrates that they were both aware of and endorsed it.¹⁸

Perhaps the most striking example of the rule in action is *Beazley v. Johnson*—a case involving application of the death penalty to a minor.¹⁹ In *Beazley*, a seventeen-year-old boy stole a car and in the process killed its driver, John Luttig, the father of U.S. circuit court Judge J. Michael Luttig.²⁰ The perpetrator, Napoleon Beazley, was convicted of murder and sentenced to death; he appealed to the Fifth Circuit on the grounds that the Eighth Amendment and the International Covenant on Civil and Political Rights prohibit the government from executing a minor.²¹ After the Fifth Circuit denied his appeal, Beazley applied for a stay of execution pending certiorari in the U.S. Supreme Court.²² Justice Scalia, to whom the stay was directed, recused himself, as did Justices Souter and Thomas—on the basis that they had a personal relationship with the victim’s son, Judge Luttig.²³ That left the

14. *See id.* at 32.

15. Hartnett, *supra* note 4, at 646 (quoting *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 111 (1868)).

16. Reynolds & Young, *supra* note 3, at 34 (quoting *Durant*, 74 U.S. at 113).

17. *See* 28 U.S.C. § 2109 (2006).

18. Hartnett, *supra* note 4, at 652.

19. *Beazley v. Johnson*, 533 U.S. 969 (2001) (mem.).

20. Edward A. Hartnett, *Ties in the Supreme Court of New Jersey*, 32 SETON HALL L. REV. 735, 735, 736 n.11 (2003).

21. *Id.*

22. *Id.*

23. *Id.* at 736 n.11.

Court with a bare quorum of only six Justices, who found themselves deadlocked 3-3.²⁴ Per longstanding practice, the Court affirmed the Fifth Circuit's decision and denied the stay of execution to Beazley on a tie vote.²⁵ The decision was roundly criticized on the ground that "a tie shouldn't go to the executioner."²⁶ After the Supreme Court's failure to reach a decision, Beazley was executed by lethal injection on May 28, 2002.²⁷

II. Designation Practices of the Federal Courts and State Supreme Courts

While the U.S. Supreme Court will not break ties, there are specific provisions in place in both the lower federal courts and in the states to temporarily replace absent or recused judges. These laws have not been shown to have had a measurable impact on the quality, consistency, or legitimacy of judicial decisions and have proven to be an effective method to address the problems created by periodic recusals. This section will explore the availability and effectiveness of these laws, both as applied to their specific jurisdictions and as a possible template for a new U.S. Supreme Court policy.

A. Federal Designation Statutes

From the inception of the lower federal courts—with the passage of the Ewerts Act of 1891 which established the federal courts of appeals—district judges have been authorized to "sit by designation" on federal appellate courts.²⁸ Originally adopted by the courts themselves, these rules were later codified in federal statute.²⁹ Under 28 U.S.C. § 292, district judges may sit by designation on federal appellate courts, as well as other district courts, either in their own circuit or in another circuit.³⁰ Assignments made within a district judge's own circuit are made at the discretion of the chief judge of the circuit whenever "the business of that court so requires;" assignments made

24. *Id.*

25. *Id.*

26. *Id.* at 736 (quoting Raymond Bonner, *Three Abstain as Supreme Court Declines to Halt Texas Execution*, N.Y. TIMES, Aug. 14, 2001, at A1).

27. *Last Statement—Napoleon Beazley*, TEX. DEP'T OF CRIMINAL JUSTICE (June 24, 2008), <http://www.tdcj.state.tx.us/stat/beazleynapoleonlast.htm>.

28. See Richard B. Saphire & Michael E. Solimine, *Diluting Justice on Appeal?: An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals*, 28 U. MICH. J.L. REFORM 351, 360 (1995).

29. 28 U.S.C. §§ 291–292, 294 (2006).

30. *Id.* § 292.

in another circuit are made at the discretion of the Chief Justice of the United States “upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.”³¹ Additionally, circuit judges may also serve by designation on appellate courts outside of their circuit, as well as federal district courts.³² Under 28 U.S.C. § 291, assignments of circuit judges to temporarily sit in other circuits may be made by the Chief Justice of the United States “upon request by the chief judge or circuit justice of such circuit,” while assignments to district courts may be made by the chief judge of the circuit or circuit justice whenever they are in the public interest.³³ However, these statutes are silent as to how a chief judge or the Chief Justice should exercise these powers, leaving the issue to the circuits to implement their own policies.³⁴ As of a 1993 survey of the circuits (the most recent of its kind available), none had a formal policy regarding designation assignments; instead the chief judge simply assigned willing judges on an informal basis.³⁵

In addition, federal judges who have retired from active service by electing “senior status” frequently sit by designation on courts outside of the court to which they were originally appointed. However, that option was not available until 1919 when Congress created senior status by statute.³⁶ In fact, historically, federal judges received no retirement benefits at all.³⁷ That changed in 1869 with the passage of the first judicial pension, designed to encourage judges with physical or mental problems to step down from the bench.³⁸ That option was technically still referred to as resignation. In 1919, a second option was created: retirement from “active service.”³⁹ Judges became eligible for either option when they had satisfied the “Rule of Eighty,” by which the “sum of their age and years of service on the federal bench reaches eighty.”⁴⁰ If, after satisfying the Rule of Eighty, a judge elects senior status, 28 U.S.C. § 371 allows the judge to reduce his workload to as little as one-quarter of the work of an active judge while still

31. *Id.*

32. *Id.* § 291.

33. *Id.*

34. *See* Saphire & Solimine, *supra* note 28, at 360.

35. *See id.* at 361.

36. David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 473 (2007); *see also* 28 U.S.C. § 371.

37. Stras & Scott, *supra* note 36, at 473.

38. *Id.*

39. *Id.*

40. *Id.* at 460.

maintaining his salary and benefits.⁴¹ Although senior judges have retired from active service, they remain members of the Article III judiciary and frequently serve temporarily on courts outside of their district or circuit.⁴²

However, the federal statutes do not apply equally to the U.S. Supreme Court. In fact, none of the retirement or designation statutes applied to Supreme Court Justices when they were first enacted.⁴³ Prior to 1937, the only option available to Supreme Court Justices was resignation, which did not provide any concomitant pension.⁴⁴ As a result, Justices prior to that time typically remained on the Court until they died in office. In fact, 49 of the first 103 Justices left the Court as a result of their death.⁴⁵ That changed in 1937, when as a result of a showdown between President Franklin D. Roosevelt and the conservative Supreme Court, Congress amended the retirement statutes to permit Supreme Court Justices to retire from active service with their full salary intact.⁴⁶ That allowed retired Justices to also sit on other federal courts by designation, but the legislation expressly barred them from serving by designation on the U.S. Supreme Court.⁴⁷ The change was designed to encourage conservative Justices, who were invalidating President Roosevelt's New Deal agenda, to retire from the Court; since allowing them to serve on that same court by designation would have run counter to that goal, Congress expressly prohibited it.⁴⁸ Today, under 28 U.S.C. § 294, retired Supreme Court Justices may be temporarily designated and assigned to any circuit or district court at the discretion of the Chief Justice of the United States.⁴⁹ But § 294(d) expressly provides that "no such designation or assignment shall be made to the Supreme Court."⁵⁰

All told, the practice of judges sitting by designation has become quite common. From 1994 to 2000, one study showed that nearly fifteen percent of all federal appellate panels were comprised of at least

41. *Id.* at 461; *see also* 28 U.S.C. § 371(e)(1) (2006).

42. *See* Dorf & McElroy, *supra* note 10, at 18.

43. *See id.* at 5.

44. *See id.* at 4 n.10.

45. *Id.* at 4.

46. *See* Jess Bravin, *Welcome Back, Souter (and O'Connor and Stevens)*, WSJ LAW BLOG (Sept. 29, 2010, 2:02 PM), <http://blogs.wsj.com/law/2010/09/29/welcome-back-souter-and-oconnor-and-stevens/>; *see also* 28 U.S.C. § 371.

47. *See* Bravin, *supra* note 46.

48. *See id.*

49. 28 U.S.C. § 294.

50. *Id.* § 294(d).

one district judge sitting by designation.⁵¹ In 2005, another study showed that district court judges sat by designation in twelve percent of appellate decisions in which an opinion was written, senior circuit judges sat by designation in twelve percent, and visiting circuit judges sat by designation in one percent.⁵² In sum, approximately one-quarter of all circuit panels included a judge who was temporarily sitting by designation.⁵³ In reviewing the decisions of appellate panels that included a district judge sitting by designation between 1984 and 1992, two researchers found that about eighteen percent of their opinions were written by the visiting district judge, a percentage significantly lower than the one-third that one would expect from random chance.⁵⁴ The study also showed that the designated judges only wrote dissenting or concurring opinions in one-to-two percent of cases, as compared to three percent among circuit judges.⁵⁵ Overall, circuit court panels with at least one district judge were reversed 18.3% of the time, as compared to 17.9% for those that only included circuit judges—a figure that implies little difference in the quality of the ultimate decisions.⁵⁶

On the other hand, some commentators have argued that the use of district judges on appellate panels does impact quality, basing their arguments on the differences between the judges appointed to each level.⁵⁷ In particular, they point to two distinctions: intellectual ability and temperament.⁵⁸ One difference between trial and appellate judges is that, according to the American Bar Association, nominees for appellate judgeships are expected to have “an especially high degree of scholarship and academic talent.”⁵⁹ Trial and appellate judges may also differ in judicial temperament, with some judges expressing their opposition to the use of district judges on appellate panels on the “grounds that trial judges often found it difficult to ‘think like

51. Gary Young, *Lost in the Shadows: District Court Judges Sitting by Designation on Circuit Courts Seem Reluctant to Rule Independently*, NAT'L L.J., Feb. 23, 2004.

52. David G. Knibb, FEDERAL COURT OF APPEALS MANUAL § 33.5 (5th ed. 2007).

53. *Id.*

54. Young, *supra* note 51.

55. Saphire & Solimine, *supra* note 28, at 370.

56. *Id.* at 369.

57. *See id.* at 392.

58. *See id.* at 392–95.

59. *Id.* at 392–93 (quoting AM. BAR ASS'N, STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 2 (1988)).

appellate judges.’”⁶⁰ The commentators argue that because the nomination and confirmation process is decidedly more rigorous for circuit court nominees, these judges are better suited to hearing the appellate cases for which they were confirmed.⁶¹

Conversely, the fact that district court judges have experience hearing trial cases might actually argue toward improving the quality of appellate decisions.⁶² That unique perspective may provide useful input in crafting rules of law that are easier to apply at the trial court level—especially since district judges, when sitting, generally only represent one vote among the three judges on a panel. Moreover, since Supreme Court Justices and circuit court judges perform largely the same function—and retired Supreme Court Justices have held the exact same position—these concerns may be less relevant when considering whether to expand the use of designated judges to the Supreme Court. While the tools necessary for judging may differ markedly between trial and appellate judges, that distinction does not apply between circuit court judges and Supreme Court Justices. Each group performs an appellate function, and the skills necessary for a circuit court judge are likely very similar to those of a Supreme Court Justice. That makes the highest Court an even better forum for the use of temporary judges than the lower courts.

Other concerns focus on the collegiality of judges and the legitimacy of the panels’ decisions. Some argue that collegiality of appellate court judges may create “better-written and more consistent decisions.”⁶³ They contend that pulling together judges from different geographic regions who do not typically work together disrupts the collegiality of many circuit panels, especially when the judges are on different “social and professional footing.”⁶⁴ Yet, this critique fails to consider that circuit court panels are already selected at random, and that each case, even without district judges, may already feature a group that has never worked together previously.

Others argue that the inclusion of a district court judge on an appellate panel gives the panel less legitimacy and carries “less authority in the eyes of litigants, their attorneys, and affected members of the

60. *Id.* at 396 (quoting J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS 137 n.g (1981)).

61. *See id.* at 392.

62. *See id.* at 377.

63. *Id.* at 372.

64. *Id.* at 376.

public.”⁶⁵ However, the decisions of panels that include a district judge and those that do not both render judgments that are binding on the parties, and their holdings are binding precedent entitled to the same weight by lower court judges. Moreover, district court judges are no less impartial or respected than circuit court judges, as each judge has completed the same constitutionally mandated process under Article III for nomination and confirmation.⁶⁶ Each judge, under Senate rules and custom, has answered questions before the Judiciary Committee, answered an extensive questionnaire, provided copies of every document they ever wrote and speech they ever delivered, and undergone a comprehensive FBI background check.⁶⁷ After confirmation, both district court and circuit court judges enjoy the same protections from Article III, including lifetime appointment and guaranteed compensation.⁶⁸ Simply put, there is no reason to believe that the decisions of a district court judge sitting by designation should be any less valid or legitimate than those made by circuit court judges.

Thus, the use of judges sitting by designation on other courts, which has been engrained as a routine practice to deal with overcrowded courts, has not been shown to have a measurable impact on the quality, consistency, or legitimacy of federal court decisions.

B. State Supreme Courts

While the U.S. Supreme Court is barred by statute from assigning temporary Justices, state supreme courts throughout the nation frequently use some kind of designation system to replace recused justices or fill-in when there are judicial vacancies. According to one survey, forty-five of the fifty states have a process that allows lower court judges to be designated and assigned in at least some state supreme court cases.⁶⁹ These processes vary greatly, from neutral, ministerial systems where a clerk selects the justice or a name is drawn from a glass jar—the actual process used in the State of Washington—to highly discretionary and more political systems, where the chief justice

65. *Id.* at 377.

66. *Judicial Nominations and Confirmations*, U.S. SENATE COMM. ON THE JUDICIARY, <http://judiciary.senate.gov/nominations/judicial.cfm> (last visited July 7, 2011).

67. *Id.*

68. *Id.*

69. Stephen R. Barnett & Daniel L. Rubinfeld, *The Assignment of Temporary Justices in the California Supreme Court*, 17 PAC. L.J. 1045 app. (1986).

selects the replacement himself.⁷⁰ Specifically, twenty-two states allow the chief justice to assign temporary replacement justices, eleven states give that power to a majority of the remaining justices on the court, eight states provide for the governor to make temporary appointments, and four states use some form of hybrid system.⁷¹

One example of a purely discretionary state system is that of California. Since 1927, the California Constitution has allowed the chief justice of the state supreme court to appoint temporary justices to that court in the case of disqualification, absence, or an unfilled seat.⁷² That power has been used rather frequently. In fact, between 1954 and 1984, there were seventy-three cases in which a temporary justice cast the deciding vote,⁷³ and between 1977 and 2003, there were 408 cases that included a lower court judge sitting by assignment.⁷⁴ Many of those decisions were hotly contested, settling issues such as whether a bystander can recover for negligent infliction of emotional distress,⁷⁵ whether a law criminalizing abortion violated the state constitution,⁷⁶ whether the University of California's affirmative action policy was constitutional,⁷⁷ and whether a legislative reapportionment plan could be used in the state's elections.⁷⁸ In each of these cases, it was a temporary replacement justice who cast the deciding vote.⁷⁹

Historically, California Supreme Court chief justices have had "almost total discretion" in deciding both on a process for filling these vacancies and in selecting the actual judges.⁸⁰ That, in turn, has prompted criticism that the process has been manipulated to favor replacements that will vote with the chief justice.⁸¹ One prominent example is *Assembly v. Deukmejian*, the 1980 reapportionment case mentioned *supra*, where Chief Justice Rose Bird used her powers to select a temporary replacement justice who voted with her to uphold a

70. See James C. Brent, *Stacking the Deck? An Empirical Analysis of Agreement Rates Between Pro Tempore Justices and Chief Justices of California, 1977–2003*, 27 JUST. SYS. J. 14, 14 (2006).

71. Barnett & Rubinfeld, *supra* note 69, at app. For example, in some states, the governor is allowed to name a temporary replacement justice, who must then be confirmed by a majority of state supreme court justices. *Id.*

72. *Id.* at 1045; see CAL. CONST. art. VI, § 6.

73. Barnett & Rubinfeld, *supra* note 69, at 1049.

74. Brent, *supra* note 70, at 21.

75. *Amaya v. Home Ice, Fuel & Supply Co.*, 379 P.2d 513 (Cal. 1963).

76. *People v. Belous*, 458 P.2d 194 (Cal. 1969).

77. *DeRonde v. Regents of the Univ. of Cal.*, 625 P.2d 220 (Cal. 1981).

78. *Assembly v. Deukmejian*, 639 P.2d 939 (Cal. 1982).

79. Barnett & Rubinfeld, *supra* note 69, at 1050–52.

80. *Id.* at 1047.

81. See *id.*

Democratic redistricting plan passed by the state legislature.⁸² The vote was 4-3, and conservatives immediately objected that the process was biased.⁸³ They argued that because temporary replacement justices are specifically selected for a single case, the process is ripe for abuse by the chief justice.⁸⁴ Evidencing this, one study found “substantial evidence of vote bias” in the selection of replacement justices by California Supreme Court chief justices.⁸⁵ Chief Justices Phil Gibson (1940–64), Roger Traynor (1964–70), and Donald Wright (1970–77) each assigned replacement justices who were over twenty percent more likely to agree with them than the other members of the court in swing cases (cases where the temporary justice cast the deciding vote).⁸⁶ Chief Justice Bird’s assignments were a tale of two halves. Prior to April 1981, Chief Justice Bird assigned temporary justices to sit for an entire calendar, which could sometimes result in one justice hearing as many as eighteen cases.⁸⁷ During that period, the lucky few judges to be selected for that role were forty-nine percent more likely to agree with her than the other justices in swing cases.⁸⁸ When she changed the policy later that year, limiting assignments to no more than a single calendar day, the bias disappeared.⁸⁹ From April 1981–1984, Chief Justice Bird’s designees were only four percent more likely to support her position than the rest of the court in swing cases, a decidedly different result.⁹⁰ The differences can be seen when reviewing all cases before and after April 1981 as well. While Chief Justice Bird’s designees agreed with her 15.8% more under the old policy, that difference dropped to 4.5% when she implemented self-imposed limits.⁹¹

Even that bias virtually disappeared under Bird’s successors, Chief Justices Malcolm Lucas (1987–1996) and Ronald George (1996–2011). Chief Justice Lucas scrapped the discretionary policy of

82. *Assembly*, 639 P.2d at 939.

83. *See Brent*, *supra* note 70, at 15.

84. *See id.* at 16–17.

85. Barnett & Rubinfeld, *supra* note 69, at 1155.

86. *Id.* at 1142. Professors Barnett and Rubinfeld compared the agreement rates between the chief justice and temporary replacement justices each chief justice appointed (in cases in which a replacement was used) with the agreement rates between the chief justice and the associate justices on the court (in cases in which a replacement was not used). The advantage described here is the percentage difference between the agreement rates of these two groups. *Id.*

87. *See id.* at 1114.

88. *Id.* at 1142.

89. *See id.*

90. *Id.*

91. *Brent*, *supra* note 70, at 22.

previous justices, instead designating replacement justices through an alphabetical rotation system conducted by the court clerk.⁹² Chief Justice George continued Malcolm's rotational system and also ended the practice of designating trial court judges, limiting his assignments to appeals court presiding judges with at least one year of prior experience.⁹³ The result was that Chief Justice Lucas's designees only agreed with him 3.5% more than the associate justices, and Chief Justice George's designees actually agreed with him 0.3% less than the rest of the court.⁹⁴ In cases decided by a 4-3 vote, while Chief Justice Bird had seen a 62.9% agreement-rate advantage between her temporary justices and the associate justices (prior to April 1981), that advantage dropped to only 9.1% under the Lucas and George reforms.⁹⁵ While there still may be some lingering bias (since even randomly-selected replacements may tend to defer to the chief justice),⁹⁶ the rotational system has dramatically limited its effect.

That leaves the issue of legitimacy. Since temporary replacement justices are by their very name temporary, a decision in which a designee participates may not represent the opinion of the permanent members of the court.⁹⁷ Perhaps that is why, even though temporary justices have participated in many 4-3 decisions where they were the deciding vote, a temporary justice is also less likely to author majority—or even concurring or dissenting—opinions. In a thirty-year study from 1954–1984, temporary justices wrote majority opinions in only four percent of their cases, as compared to thirteen percent among permanent justices.⁹⁸ Likewise, temporary justices wrote concurring or dissenting opinions in eight percent of their cases, as compared to sixteen percent among permanent justices.⁹⁹ Yet regardless of who is writing the opinions, the decisions have the same force of law, irrespective of whether a temporary justice cast the deciding vote. While some may contend that a decision in which a temporary justice cast the deciding vote has less legitimacy, by law it carries the same binding force on all state courts as any other decision.¹⁰⁰ Some of the state's most contentious issues—from abortion to affirmative action—have

92. *Id.* at 18.

93. *Id.*

94. *Id.* at 22.

95. *Id.* at 24.

96. *See* Barnett & Rubinfeld, *supra* note 69, at 1164.

97. *See id.* at 1169.

98. *Id.* at 1164.

99. *Id.*

100. *Id.* at 1170.

been decided by temporary justices, and yet we do not today discuss these holdings with any less weight. If temporary justices had not been used, these cases would have instead resulted in tie votes, creating no binding precedent or uniform rules—and surely far less legitimacy than the alternative. California’s history with temporary justices has shown that the key to ensuring legitimacy is eliminating bias, not abandoning the system of replacement altogether.

III. The Use of Temporary Replacement Justices in the U.S. Supreme Court

While the use of temporary replacements in the lower federal courts and state supreme courts has proven to be a workable solution, there remain unique issues when using such a system in the court of last resort. This section will address these unique policy issues and evaluate three specific proposals for how to implement the designation of temporary Justices in the U.S. Supreme Court.

A. The Policy Rationale

Each of the specific proposals discussed *infra* is premised on the idea that rendering a final decision on a case the Court has accepted is preferable to affirmance by an equally divided Court, which carries with it no precedential value. Establishing a policy to temporarily replace recused Supreme Court Justices would likely have significant effects in three principal areas: how frequently and in what circumstances the Court’s members recuse themselves; the certainty of the rule of law and the consistency it provides to the lower courts; and the legitimacy of the Court’s decisions as viewed by judges, litigants, and the public.

1. Evaluating the Impact on Recusal

While critics of a Supreme Court designation policy frequently cite the low rate of recusal on the Court as reason for not needing such a change,¹⁰¹ the better question is how the lack of a designation policy affects the Justices’ individual decisions on recusal. Admittedly, it is true that the Court only split 5-4 in sixteen of its seventy-two cases during the 2009 term and that even in an unusual term (such as the 2010 term where Justice Kagan recused herself in a third of the cases),

101. See Amanda Frost, *Academic Round-up*, SCOTUSBLOG (Mar. 17, 2011, 11:55 AM), <http://www.scotusblog.com/2011/03/academic-round-up-65/>.

the Court is unlikely to deadlock 4-4 in more than a few decisions.¹⁰² But lurking beneath the surface lies the question of whether recusals would be far more frequent if Justices could rely on a replacement to prevent tie votes.

Indeed, the Court's relative lack of recusals is by no means a definitive statement that its members are free from conflicts of interest. In a recent New York Times editorial, the newspaper lambasted the Supreme Court's failure to follow a comprehensible recusal policy.¹⁰³ It noted, for example, that the Court in its previous term considered an important gender-bias case against Wal-Mart, while at the same time Justice Antonin Scalia's son was the co-chairman of the labor and employment practice at the law firm representing Wal-Mart.¹⁰⁴ Yet, Justice Scalia refused to recuse himself.¹⁰⁵ At the same time, Justice Clarence Thomas has received lavish gifts from litigants before the Court, including a \$15,000 bust of Abraham Lincoln given by the conservative American Enterprise Institute, who frequently files amicus briefs.¹⁰⁶ Yet Justice Thomas has steadfastly refused to recuse himself in such cases.¹⁰⁷ While it is outside the scope of this Comment to evaluate the Supreme Court's recusal practices, it is important to understand that recusal decisions are left entirely to individual Justices,¹⁰⁸ who are not required to follow the Code of Conduct for U.S. Judges.¹⁰⁹ There is "no review mechanism, no opinion or public reasoning required, no legal accountability, and no mechanism to handle replacement when recusal occurs."¹¹⁰ Simply put, the lack of frequent recusals does not equal the lack of a problem.

102. *Id.*

103. Editorial, *The Court's Recusal Problem*, N.Y. TIMES, Mar. 16, 2011, at A30, available at <http://www.nytimes.com/2011/03/16/opinion/16wed3.html>.

104. *Id.*

105. *Id.* Justice Scalia ultimately wrote the majority opinion to overturn the Ninth Circuit's certification of a class action against Wal-Mart, thereby absolving the company his son's firm represented from liability—but only further implicating his own impartiality. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

106. Ian Millhiser, *The Clarence Thomas Scandal*, THINK PROGRESS (June 22, 2011 4:30 PM), <http://thinkprogress.org/progress-report/the-clarence-thomas-scandal/>.

107. *Id.*

108. See Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 109 (2004).

109. Letter from More Than One Hundred Law Professors to Senator Patrick Leahy, Senator Charles Grassley, Representative Lamar Smith, and Representative John Conyers, Jr. (Mar. 17, 2011), available at http://www.afj.org/judicial_ethics_sign_on_letter.pdf (calling for mandatory ethical and recusal rules for Supreme Court Justices).

110. Roberts, *supra* note 108, at 109.

One compelling reason that Justices may decline to recuse more frequently is the lack of any designation policy to avoid an evenly-divided Court. In the Supreme Court's 1993 Statement on Recusal Policy, signed by Justices Rehnquist, Stevens, Scalia, Thomas, O'Connor, Kennedy, and Ginsburg, the Justices observe that "where the absence of one Justice cannot be made up by another, needless recusal deprives litigants of the nine Justices to which they are entitled, produces the possibility of an even division on the merits of the case, and has a distorting effect upon the certiorari process."¹¹¹ Similarly, in *Cheney v. U.S. District Court*, Justice Scalia rejected Sierra Club's request that he recuse himself after engaging in a duck-hunting excursion with Vice President Richard Cheney prior to oral argument.¹¹² In a memorandum explaining his decision, Justice Scalia concluded:

Let me respond, at the outset, to Sierra Club's suggestion that I should "resolve any doubts in favor of recusal." That might be sound advice if I were sitting on a Court of Appeals. There, my place would be taken by another judge, and the case would proceed normally. On the Supreme Court, however, the consequence is different: The Court proceeds with eight Justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case.¹¹³

That same year, Justice Ginsberg echoed Scalia's sentiment, observing the same effect of recusal and noting that "[b]ecause there's no substitute for a Supreme Court Justice, it is important that we not lightly recuse ourselves."¹¹⁴ Moreover, without any designation process, the Court's current recusal policy may simply encourage litigants to file recusal motions purely predicated on an "unfavorable outcome from a particular Justice on the merits."¹¹⁵

The addition of a designation process, by which temporary replacement Justices could substitute for recused Justices, would obviate this problem. Since whatever process the Court used to select a replacement would likely create uncertainty as to the replacement's

111. Statement of Recusal Policy, from Justices Rehnquist, Stevens, Scalia, Thomas, O'Connor, Kennedy, and Ginsburg, Supreme Court of the United States (Nov. 1, 1993), available at http://www.eppc.org/docLib/20110106_RecusalPolicy23.pdf. Chief Justice Roberts and Justice Alito also adopted the 1993 recusal policy when they joined the Court. See Tony Mauro, *Justice Alito's Green Day*, LEGAL TIMES, Feb. 8, 2006, at 1; Lyle Denniston, *Roberts' Recusal Policy*, SCOTUSBLOG (Sept. 30, 2005, 4:54 PM), <http://www.scotusblog.com/2005/09/roberts-recusal-policy>.

112. *Cheney v. United States*, 541 U.S. 913 (2004) (Scalia, J.).

113. *Id.* at 915.

114. Ruth Bader Ginsburg, *An Open Discussion With Justice Ruth Bader Ginsburg*, 36 CONN. L. REV. 1033, 1038-39 (2004).

115. Roberts, *supra* note 108, at 180 n.360.

vote, litigants would no longer be encouraged to file recusal motions entirely designed to change the outcome.¹¹⁶ Indeed, Senator Patrick Leahy (D-VT), whose proposal to use retired Supreme Court Justices will be discussed *infra* Part III.B., said in remarks on the floor of the U.S. Senate, “I hope that it will encourage Justices to recuse themselves when they have a financial conflict of interest or their participation would create the appearance of impropriety.”¹¹⁷ Indeed, reforming the Supreme Court’s replacement process would go a long way toward mending a broken recusal policy.

2. Certainty and Consistency in Law

The creation of a process for temporary replacements will also create certainty in the rule of law and provide consistent guidance to the lower courts. Of course, some critics contend that the Supreme Court can “function perfectly well with eight Justices on a case,” since the only formal effect of a 4-4 outcome is to let the lower court decision stand.¹¹⁸ They say that is simply not a problem since it is precisely the same result that occurs in every other case—typically numbering in the hundreds—in which the Court denies certiorari.¹¹⁹ Moreover, even if a decision splits 4-4, that result does not foreclose the same issue from being resolved in a subsequent case.¹²⁰ Yet, this may be an overly simplistic analysis. The cases that are under review are not just any cases; they are cases on which the Court has made the affirmative decision to select for argument and decision. Indeed, the very fact that the Court has selected these specific cases—out of a pool of hundreds—strongly suggests that the issues are sufficiently weighty or that the lack of a Supreme Court decision might allow pernicious circuit splits to persist.¹²¹

There are important reasons why—once a case has been deemed worthy of a decision—it should be decided, absent extraordinary circumstances. First, many of the cases turn on significant constitutional issues, which frequently have a critical impact on the basic functioning of our government and the boundaries of our rights.¹²² Yet when

116. *Id.*

117. 156 CONG. REC. S7792 (daily ed. Sept. 29, 2010) (statement of Sen. Patrick Leahy).

118. Jason Mazzone, *4-4 Is Fine*, BALKINIZATION (Oct. 8, 2010, 1:59 PM), <http://balkin.blogspot.com/2010/10/4-4-is-fine.html>.

119. *See id.*

120. *See id.*

121. *See* Dorf & McElroy, *supra* note 10, at 10 n.40.

122. *See* Reynolds & Young, *supra* note 3, at 32.

these critical lower court issues are left unreviewed by the Supreme Court, Congress, the courts, and the people never receive a definitive answer to some of the most important legal issues of our time.

Second, the lower court decisions on any given legal issue may irreconcilably conflict, especially since the Supreme Court is generally more likely to accept cases that involve a circuit split.¹²³ When these issues are left unresolved, those circuit splits persist, leaving one rule of law in place in some parts of a country and another, often entirely contrary rule in place in other parts—even in cases that involve the exact same factual issue. As mentioned *supra*, the splits between circuits over President Obama’s health care reform law are a prime example.¹²⁴ Observing this real concern, Chief Justice William Rehnquist described such stalemates as the courts laying down “one rule in Athens, and another rule in Rome”—a problem our legal system was structured to avoid.¹²⁵ Yet, the lack of any mechanism to replace recused Justices only makes such scenarios more likely to occur.

3. Legitimacy of the Court’s Decisions

Finally, there is the issue of legitimacy. Supporters and critics of instituting designation practices at the Supreme Court hotly dispute whether it would increase or decrease the legitimacy of the Court’s decisions in the eyes of the lower courts, the parties, and the public. Critics assert that close cases decided by a Justice sitting by designation could carry less authority than the Court’s other decisions.¹²⁶ They argue that since a recused Justice might later return to settle a substantially similar issue when not recused, the Court might be even less likely to follow *stare decisis*, putting decisions that turned on a designated Justice on shaky ground.¹²⁷ That, in turn, might disrupt the continuity of the Court’s precedents and undermine the public’s confidence in the institution.¹²⁸ While there may be some truth to this logic, one must also consider that Supreme Court cases are not decided in a vacuum. The question is not simply whether designation might impact legitimacy but rather whether designation would be

123. *See id.*

124. *See supra* Introduction.

125. 156 CONG. REC. S7793 (daily ed. Sept. 29, 2010) (statement of Sen. Patrick Leahy).

126. Reynolds & Young, *supra* note 3, at 38.

127. Mike Dimino, *Sitting by Designation on the Supreme Court*, CONCURRING OPINIONS (Jan. 13, 2006, 10:44 AM), http://www.concurringopinions.com/archives/2006/01/sitting_by_desi.html.

128. Reynolds & Young, *supra* note 3, at 38.

more or less legitimate than affirmance of a lower court decision by an equally-divided Court. On that point, Chief Justice Rehnquist acknowledged that “decisions of important questions of statutory or constitutional law by less than a full court are, other things being equal, undesirable.”¹²⁹ In a case where one of the Justices has elected recusal, unique circumstances arise. Chief Justice Rehnquist was acutely aware of the ramifications of recusal, noting that it “does not simply substitute one full court for another; instead it removes one of the component parts of the court, and the litigants have their case decided by a partially truncated judicial tribunal.”¹³⁰ That circumstance alone bodes ill for the legitimacy of the Court’s ultimate decision.

Recusal without a replacement also creates practical problems that may distort the way the final vote is tallied, further implicating the Court’s legitimacy. Specifically, Justice Scalia observed that granting a recusal motion has the same de facto result as casting a vote against the petitioner in a given case.¹³¹ Justice Scalia, writing in his memorandum in *Cheney*, reasons that since the petitioner “needs five votes to overturn the judgment below, and it makes no difference whether the needed fifth vote is missing because it has been cast for the other side, or because it has not been cast at all,” the current recusal system is effectively no different than simply voting no.¹³² Thus, the current incentives—which only encourage Justices to recuse when it would not affect the ultimate decision—are already devoid of legitimacy. The implementation of replacements would begin to rectify that problem, plugging the hole that is already apparent in the ship.

Finally, opponents also criticize the possibility that a temporary replacement may not reflect the views of the Justice she replaces, creating a rule of law that the permanent Justices would not otherwise support. Yet this view also seems to miss the mark. If a replacement Justice were somehow guaranteed to vote identically to the Justice she replaced—a situation far from likely as discussed *infra*—it would not resolve the conflict of interest that precipitated the original Justice’s recusal. Since any Justice considering recusal would have the confidence to know that their replacement would follow their views, they could simply rely on this fact to impute the conflict to the designated

129. Roberts, *supra* note 108, at 157 (quoting William H. Rehnquist, *Sense and Nonsense About Judicial Ethics*, 28 REC. ASS’N B. CTRY N.Y. 694, 707 (1973)).

130. *Id.* (emphasis omitted).

131. *Cheney v. United States*, 541 U.S. 913 (2004) (Scalia, J.).

132. *Id.* at 916.

Justice. While it is true that a decision of a Court with a temporary Justice may very well be different than one without, those decisions do not carry any less binding authority on the parties or the Courts than any other. Indeed, as the experience of state supreme courts has shown, especially in California as discussed *supra*, controversial decisions where designated Justices have cast deciding votes have not lessened the legitimacy of the courts.¹³³ Even if we assume, *arguendo*, that a designated Justice might provide the deciding vote for an erroneous decision, it does not necessarily mean that the choice to use a system of designation was the wrong choice. As Justice Louis Brandeis noted, “It is usually more important that a rule of law be settled, than that it settled right.”¹³⁴ These proposals would resolve issues that could not otherwise be resolved.

B. The Replacements: Evaluating Three Proposals for Temporary Justices on the U.S. Supreme Court

Having established that the idea of allowing the U.S. Supreme Court to use temporary replacement Justices merits serious consideration, this Comment will now consider three possible implementations, including one that has been proposed in Congress. The following proposals include plans to use retired Supreme Court Justices, the chief judges of the circuit courts of appeals, and a pool of all circuit courts of appeals’ judges.

1. Retired Supreme Court Justices

The most widely discussed proposal was introduced by Senate Judiciary Chair Patrick Leahy, who proposed that the Court allow retired Supreme Court Justices—who already can serve on circuit and district courts—to serve by designation on the U.S. Supreme Court.¹³⁵ The genesis of the proposal came from retired Justice John Paul Stevens, who suggested to Senator Leahy that he explore the idea.¹³⁶ Justice Stevens and Justice Rehnquist had actually tried to implement the idea on their own a few years prior, but according to Stevens, they were simply “unable to persuade their colleagues to adopt the proposal.”¹³⁷ Under the Leahy proposal, a majority of the active Justices

133. See *supra* Part II.B.

134. *Di Santo v. Pennsylvania*, 273 U.S. 34, 42 (1927) (Brandeis, J., dissenting).

135. S. 3871, 111th Cong. (2010).

136. 156 CONG. REC. S7792 (daily ed. Sept. 29, 2010) (statement of Sen. Patrick Leahy).

137. Dorf & McElroy, *supra* note 10, at 3 n.7.

could vote to designate a retired Supreme Court Justice in a particular case.¹³⁸ It reads, in relevant part:

Any retired Chief Justice of the United States or any retired Associate Justice of the Supreme Court may be designated and assigned to serve as a justice on the Supreme Court of the United States in a particular case if—

(A) any active justice is recused from that case; and

(B) a majority of active justices vote to designate and assign that retired Chief Justice or Associate Justice.

The bill, instead of mandating a designation practice, would simply delegate that authority to a majority of the active Justices, just as the current designation statutes delegate the authority to designate and assign retired Supreme Court Justices to district and circuit courts to the Chief Justice.

In principle, there are many benefits to using retired Supreme Court Justices. Retired Justices have been described as a “valuable human resource,” and while the group may be small, they can provide valuable insight and skill to the Court on occasion.¹³⁹ While most professionals in other fields still make meaningful contributions at the highest levels long after retirement, Supreme Court Justices are barred from participating in any way on the Court to which they were originally appointed.¹⁴⁰ Yet, at the same time, from their work on district and circuit courts across the country, we know that they are still more than capable of serving.¹⁴¹ The three living, retired Supreme Court Justices—O’Connor, Souter, and Stevens—have served collectively for nearly eighty years, and by all accounts, each still retains his or her sharp wit and skills.¹⁴² For instance, Justice O’Connor, even at age eighty-one, has been actively involved in hearing cases since she retired from active service.¹⁴³ Justice O’Connor has decided almost eighty cases and written over a dozen opinions since she left the Court in 2006, and yet the talents of this formidable former Supreme Court Justice seem wasted on “small potatoes.”¹⁴⁴ For instance, in one O’Connor opinion, she tackled the formidable question of whether

138. *Id.* at 3.

139. *Id.* at 9.

140. *See id.*

141. *See* Michael C. Dorf, *Some Possible Hidden Complications of a Senate Proposal to Permit Retired Justices to Pinch-Hit for Their Recused Colleagues*, *FINDLAW* (Oct. 6, 2010), <http://writ.news.findlaw.com/dorf/20101006.html>.

142. *See id.*

143. *See* Jess Bravin, *Change of Venue: In Retirement, Justice O’Connor Still Rules*, *WALL ST. J.*, Aug. 11, 2009, at A13, available at <http://online.wsj.com/article/SB124994271588320565.html>.

144. *See id.*

an animal control officer that was being sued for trespass had a duty to check if a wolf—that was illegally registered as an Alaskan malamute—was lawfully owned before seizing the animal.¹⁴⁵ This is why most Supreme Court Justices have passed on the opportunity to serve in the lower courts after retirement.¹⁴⁶ In the words of Justice Potter Stewart, “[It’s] no fun to play in the minors after a career in the major leagues.”¹⁴⁷ The Leahy proposal would rectify that predicament and put the substantial talents of retired Supreme Court Justices back to use.

At the same time, it would also present many logistical problems, given the small size of the pool of retired Justices and the difficulty in deciding how to select a particular Justice. For starters, the pool of retired Supreme Court Justices is likely to be unreliably sized and relatively small.¹⁴⁸ With a small number of living retired Justices available to serve—especially if one or more has mental or physical health concerns—there may not be enough Justices to handle the load in a term with a significant number of recusals. The pool itself may also be slanted toward a particular ideology, making it more or less likely that particular Justices would be inclined to recuse.¹⁴⁹ For instance, none of the current retired Supreme Court Justices—O’Connor, Souter, and Stevens—can be considered a true conservative. Were this proposal in place for the current term and Justice Kagan was recused, the conservative Justices would have no incentive to select a replacement. With Justice Kagan off the Court, the worst they could do is reach a tie, but with a replacement Justice, the conservatives might actually end up on the losing end—since each of the current retired Supreme Court Justices is considered more liberal than Justice Kennedy.¹⁵⁰

Even if the Supreme Court could get past that question, there remains the issue of how the Court would decide which retired Justice to choose. Under the Leahy proposal, that choice would be left to the remaining active Justices, who could deadlock 4-4, resulting in the same problem that the proposal was designed to solve. Justice Harry Blackmun, commenting on the possible unintended consequences of the original Stevens-Rehnquist proposal asked, “Who shall select the retired Justice? . . . Would the Chief Justice make the selection? If so,

145. *See id.* O’Connor began her opinion, “This is a case about a wolf named Dutchess,” and she ultimately rejected the couple’s claim for trespass. *Id.*

146. *Id.*

147. *Id.*

148. *See* Roberts, *supra* note 108, at 176 n.345.

149. *See id.*

150. *See* Dorf, *supra* note 141.

would those not selected have their noses out of joint? Or would he follow the rule of seniority? Problems create problems”¹⁵¹ In considering this question, it seems obvious that for this proposal to be workable, the Court, on its own accord, would need to implement some kind of rotational system or random lottery, borrowing from the ideas of other state supreme courts (especially the California Supreme Court, discussed *supra* Part II.B.). While a random lottery would resolve the problem of who to designate, even a random selection from a limited—and potentially biased—pool would still pose significant practical problems. For these reasons, it seems the Leahy proposal may simply not be workable.

2. Chief Judges of the Circuit Courts

Another proposal, suggested by Professor Caprice Roberts at West Virginia University College of Law, would be to use a pool comprised of each of the chief judges of the circuit courts of appeals.¹⁵² Currently, chief judges on each of the federal appeals courts are selected by seniority. The most senior judge, who is sixty-four years old or younger, has been a circuit judge for at least one year, and has not served previously as chief judge is elevated to the position for a seven-year term.¹⁵³ However, under Roberts’s proposal, instead of basing selection on seniority, Congress would alter this statutory scheme to allow the President to nominate—and the Senate to confirm—existing circuit court judges for the position of chief judge.¹⁵⁴ This would obviate any concerns that using existing chief judges might violate the Appointments Clause of the Constitution, since the scope of their prior confirmations might not have included the possibility of being designated and assigned to serve temporarily on the U.S. Supreme Court.¹⁵⁵ When a recusal occurs, the Court would then select one of these chief judges by random lottery, excluding the judge from the circuit in which the case originated to prevent conflicts of interest and limit any bias.¹⁵⁶

This proposal would have some significant advantages, in that the pool of chief judges would likely include judges of the “highest cali-

151. Roberts, *supra* note 108, at 180 (quoting Interview by Harold Hongju Koh with retired Justice Harry A. Blackmun, Harry A. Blackmun Oral History Project, in Washington, D.C. (Nov. 1, 1995)).

152. *See id.* at 176.

153. 28 U.S.C. § 45 (2006).

154. Roberts, *supra* note 108, at 177.

155. *See id.* at 178; *see also infra* Part IV.B.

156. *See infra* Part IV.B.

ber” in intellect, experience, and skills on the federal bench.¹⁵⁷ Since the judges would be handpicked by the President and closely scrutinized by the Senate, the nomination and confirmation process would likely meet a much higher standard than an ordinary circuit court judge—perhaps more akin to the process for Supreme Court nominations. In essence, the proposal would create a “shadow court” comprised of the next-best options to sitting Supreme Court Justices, who could replace them when necessary and possibly even be groomed for a lifetime appointment when a permanent vacancy occurs.

However, it would also present several logistical and substantive problems. First, since the new chief judges would require nomination and confirmation, that process would need to be staggered over a number of years or presidential administrations to prevent one political party from appointing the entire pool.¹⁵⁸ The President could either use the new process to appoint replacements when chief judge vacancies arise—although that would create inconsistency among the circuits and require a delay of the implementation date—or the law could be written to provide a set number of appointments to successive presidents. Either method would create logistical issues and delay the practical effective date of the plan by perhaps ten to fifteen years, neither of which would be desirable. Second, the expansive administrative duties of a chief judge might not be consistent with the type and caliber of judges appointed to these positions. Chief judges groomed to temporarily—and perhaps even permanently—replace Supreme Court Justices would presumably be best used deciding a significant docket of cases, yet these judges may instead become overburdened in administrative bureaucracy—a task ill-suited to their skill set. Third, and most importantly, making chief judges subject to nomination and confirmation could result in the politicization of the post.¹⁵⁹ Since Justices would be forced to jockey for these enviable positions, it might affect their lower court decision making. Instead of deciding cases purely on the merits—free from political considerations due to their lifetime tenure—appellate judges may instead try to tailor their decisions to meet the political whims of the President or Congress, ensuring their consideration for a coveted chief judge spot. Moreover, the process itself may turn decidedly political, creating thirteen more prime judicial positions on which to fight partisan battles, stage theater-style confirmation hearings, filibuster, and exploit for

157. *See id.*

158. *See id.* at 177.

159. *See Roberts, supra* note 108, at 177.

party fundraising. Therefore, while Roberts's proposal definitely does have its appeal, the practical problems of nominating and confirming thirteen new chief judges may simply be insurmountable.

3. All Circuit Courts of Appeals Judges

The last—and perhaps most workable—proposal has been suggested by Howard Bashman, author of the popular legal blog, *How Appealing*.¹⁶⁰ His proposal is simply to use the pool of all nonrecused federal circuit judges in regular active duty.¹⁶¹ Assignment would be made by random lottery, and if a case reaches the Court from a federal appellate court—as opposed to a state supreme court—the proposal would also exclude all federal appellate judges from the circuit in which it arose.¹⁶² This policy would prevent the possibility that a designated judge might “be influenced by a desire to improve his or her circuit's affirmance rate” and ensure that the judge selected had not had any earlier involvement in the case.¹⁶³ In addition, the proposal would be strictly limited to recusals or “other temporary unavailability” and exclude formal vacancies, since providing a method for filling a vacancy by designation might encourage the Senate to delay confirming a permanent replacement.¹⁶⁴

Of the three options, this proposal is the simplest and easiest to implement. Unlike the use of retired Supreme Court Justices or newly-minted chief judges, which both create unnecessary complications and comprise relatively limited pools, the use of all active circuit court judges would provide the Supreme Court with a pool of over a hundred judges from which to draw. These judges, having already been confirmed by the Senate for the second-most important judicial positions in the country, are likely to be highly skilled, intellectually capable individuals ready to contribute to the nation's highest court. This proposal also most closely matches the successful systems already in place at the state level, especially the California model discussed *supra*.

Critics might complain that a pool comprised of all circuit judges might include a greater number of judges who hold rigidly ideological or extreme views or who have developed a reputation on the appellate

160. See Howard J. Bashman, *HOW APPEALING*, <http://howappealing.law.com/> (last visited May 18, 2011).

161. See Howard J. Bashman, *Avoiding Recusal-Based Tie Votes at the U.S. Supreme Court*, LAW.COM (Mar. 4, 2008), <http://www.law.com/jsp/article.jsp?id=1204544938947&slreturn=1&hblogin=1>.

162. See *id.*

163. *Id.*

164. *Id.*

courts for not strictly following the law. While it is true that a pool of over one hundred judges is more likely to produce a few bad apples than a pool of chief judges groomed for the jobs or retired Supreme Court Justices who have already done them, such diversity of views and legal philosophies might actually prove useful to the U.S. Supreme Court. Instead of remaining cloistered in their well-appointed chambers, hermetically sealed from the rest of the judicial system, the periodic designation of appellate judges to sit alongside the permanent Justices might spur dialogue, create debate, and result in better decision making. For these reasons, the proposal to use circuit judges—simplest among the options reviewed—may present the most straightforward and workable solution to solving the Supreme Court’s recusal albatross. The only remaining question is whether it is constitutional.

IV. Constitutionality of Temporary Replacement Justices on the U.S. Supreme Court

In considering whether Congress can provide for the designation and assignment of temporary replacement Justices on the U.S. Supreme Court, there is one broad, overriding concern, as well as specific objections to the types of Justices used: circuit court judges and retired Supreme Court Justices. First, this Comment will analyze whether statutory designation policies run afoul of the Constitution’s One Supreme Court Clause. Second, it will discuss whether proposals to use a pool of circuit judges or even appeals court chief judges impinges on the President’s powers in the Appointments Clause. Finally, it will consider whether the use of retired Supreme Court Justices, either as its own proposal or as part of a larger pool, conflicts with the meaning of “judicial office” embedded in Article III.

A. One Supreme Court Clause

The U.S. Constitution vests judicial power in “one Supreme Court”—a fundamental, overarching requirement that must be satisfied irrespective of the particular proposal. Article III, Section 1 of the Constitution clearly states, “The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”¹⁶⁵ Critics make one basic objection to all designation proposals: since they would create a Supreme Court with “fluctuating membership,” there would not actually be “one Supreme Court” but multiple courts as the

165. U.S. CONST. art. III, § 1.

membership changes.¹⁶⁶ While no court has ever authoritatively determined the meaning of the One Supreme Court Clause, there are two possible interpretations: one based on its plain meaning and the other based on a more formalistic, original interpretation.

First, a plain reading of the One Supreme Court clause may simply require that while Congress may create lower federal courts, it cannot create any additional supreme courts.¹⁶⁷ Yet even by this standard, some have argued that the Constitution would still allow the Supreme Court to be split into panels.¹⁶⁸ For instance, courts that “regularly sit[] in panels—like the United States Court of Appeals for the Second Circuit—can be understood as ‘one’ court.”¹⁶⁹ The authors here analogize to professional sports teams, noting that in common usage, teams are generally thought of as a collective unit, even though their individual membership will vary in terms of who is active on the field at any given moment.¹⁷⁰ Moreover, the Supreme Court has a long history of single-Justice decisions—especially in the case of Supreme Court Justices exercising their powers as circuit justices—and has never once considered that this practice might violate the One Supreme Court Clause.¹⁷¹ Therefore, under this interpretation, because there is no clear prohibition in constitutional text or history, a proposal to use recused Justices would be presumptively constitutional.

Second, under a more formal, originalist view of the Constitution, one might argue that the One Supreme Court Clause includes an indivisibility requirement.¹⁷² In this context, indivisibility would mean “one body of people that cannot be altered on its fixed court.”¹⁷³ Some scholars have argued that this interpretation can be justified by the fact that “participants in the debates at the Philadelphia Convention assumed that ‘one Supreme Court’ meant one indivisible Supreme Court.”¹⁷⁴ However, the evidence for this interpretation is shaky at best, and even the authors that promote it acknowledge that the issue was never discussed during the public de-

166. Dorf & McElroy, *supra* note 10, at 20.

167. See Roberts, *supra* note 108, at 178.

168. See Dorf & McElroy, *supra* note 10, at 20–21.

169. *Id.* at 21.

170. See *id.* at 21 n.102.

171. See *id.* at 21. In addition, during the period of 1802–1839, a single Justice was “empowered to act (on many matters) in place of the entire Supreme Court during an ‘August Term.’” *Id.*

172. See *id.*

173. Roberts, *supra* note 108, at 178.

174. Dorf & McElroy, *supra* note 10, at 21 (emphasis omitted).

bate regarding ratification.¹⁷⁵ Yet even if one accepts, *arguendo*, that “one Supreme Court” really means “one indivisible Supreme Court,” there are still logical reasons why substituting replacement Justices in individual cases would not run afoul of that requirement. For starters, the number of Justices on the Court—of which the maximum is currently set by statute—changes whenever a vacancy occurs.¹⁷⁶ It changes when Congress decides to amend the composition of the Court—something it has done previously.¹⁷⁷ And it changes when a Justice recuses herself, temporarily creating a Court with one fewer member. But of course, none of these changes has ever been held to render the Court a divisible body or violate the One Supreme Court Clause.¹⁷⁸

Finally, even if a formalistic reading of the One Supreme Court Clause did conclude that designation proposals conflicted with this provision, there is an equally formalistic solution that could save such a statute. Since Congress retains the power to make exceptions to the Court’s appellate jurisdiction under Article III, Section 2, Congress could simply strip the “real” Supreme Court of its appellate jurisdiction, instead creating a lower court body comprised of the same Justices to hear these cases.¹⁷⁹ This new body would have the power to designate and assign temporary Justices, and not being the U.S. Supreme Court, would not need to comply with the One Supreme Court Clause. While such a formalistic solution is not particularly desirable, it serves to illustrate why a formalistic reading of the One Supreme Court Clause does not comport with common sense.¹⁸⁰ Therefore, since designation proposals would not run afoul of the plain language of the One Supreme Court Clause and more formalistic readings cannot be justified, these statutes, on their face, are likely to pose no constitutional problem.

B. Circuit Judges and the Appointments Clause

Unique in the proposals to designate and assign circuit judges or appeals court chief judges is the question of whether such a system would violate the President’s Article II power to nominate Supreme Court Justices. Article II, Section 2 of the Constitution provides that

175. *See id.*

176. *See Roberts, supra* note 108, at 179.

177. *See id.*

178. *See id.*

179. *See Dorf & McElroy, supra* note 10, at 22.

180. *See id.* at 23.

the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court.”¹⁸¹ Since the Appointments Clause gives exclusive power to the President to nominate and the Senate to confirm Supreme Court Justices, the objection would be that allowing circuit court judges to serve, even temporarily, on the Supreme Court would impinge on the President’s powers—since they were never officially nominated or confirmed for that office.¹⁸²

In considering this question, the basic rule is that Congress may not add “new, fundamentally different duties to an existing office without unlawfully seizing the appointment power for itself.”¹⁸³ This rule is based on the fundamental principle of separation of powers, sometimes referred to in this context as self-aggrandizement by Congress.¹⁸⁴ If Congress were to fundamentally change the duties of an existing office, that action would both create a new office and hand-pick the officeholder.¹⁸⁵ To take an obvious example, if Congress changed the duties of the Ambassador to Luxembourg to include hearing federal appellate cases on the D.C. Circuit, it would usurp the President’s power to nominate federal judges. However, “minor changes or additions [to an existing office]” do not necessitate reappointment, so long as the new duties are within the scope of the current office.¹⁸⁶ For example, if Congress were to provide Federal Communications Commission members with the power to regulate network neutrality on the Internet, it would almost undoubtedly conform to the Appointments Clause, since regulating telecommunications services falls within the existing scope of their offices. Such a change would only rise to a constitutional violation when the change is so severe that it creates an entirely new office.

In *Weiss v. United States*—the leading case on this point—the Supreme Court considered a statute that provided new duties to commissioned military officers that held bar memberships and had been selected by the Judge Advocate General (“JAG”).¹⁸⁷ Congress had changed the duties of their offices to authorize them to serve as military judges.¹⁸⁸ The Court there applied a test of “germaneness,” com-

181. U.S. CONST. art. II, § 2.

182. See Roberts, *supra* note 108, at 179.

183. Stras & Scott, *supra* note 36, at 457.

184. See *id.* at 495.

185. See *id.*

186. *Id.* at 496.

187. *Weiss v. United States*, 510 U.S. 163, 166–96 (1994).

188. *Id.* at 175.

paring their existing duties to the new ones provided by Congress.¹⁸⁹ Officers already had the power to apprehend suspects, impose nonjudicial disciplinary punishments, and review court-martial sentences, while the new duties only applied when “detailed” or “assigned” to serve and still allowed officers to perform nonjudicial duties with the permission of the JAG.¹⁹⁰ Therefore, the Court decided that “the role of military judge is ‘germane’ to that of military officer” and upheld their constitutionality under the Appointments Clause.¹⁹¹ In effect, the Court’s germaneness test was one of *de facto* reasonableness.¹⁹²

Applied here, the addition of the statutory authority for circuit court judges to sit by designation on the Supreme Court when necessary seems to be squarely within the scope of their existing offices. Circuit court judges are engaged in the act of judging; in fact, it is the primary responsibility of their office. The proposal suggested here would simply extend that existing duty to performing essentially the same activity at a higher level and only in limited situations where an existing Justice is recused. While it would be another circumstance entirely if Congress suddenly transformed circuit court judges into Supreme Court Justices—as it would supplant, rather than minimally supplement their existing duties—the addition of infrequent, limited assignments to replace recused Justices would seem to be perfectly germane to the purview of their offices.

Moreover, since every active circuit court judge would be eligible for designation and assignment, there would be no need for the President to nominate particular individuals. The role of a temporary Justice would not be a new office but rather only a fleeting assignment, ensuring that its creation would not encroach on the separation-of-powers rationale underlying the Appointments Clause. After all, the individuals within the pool of temporary replacements would be federal circuit court judges, who have already been nominated and confirmed to hold office as bonafide members of the Article III judiciary. Although they have not been specifically appointed as Justices to the Supreme Court, federal judges frequently serve temporarily by designation on other Article III courts to which they have not been nominated, and retired Supreme Court Justices even serve on other Article

189. *Id.* at 174–76.

190. *Id.* at 175–76.

191. *Id.* at 176.

192. Stephen G. Calabresi & David C. Presser, Essay, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386, 1403 (2006).

III courts to which they were never nominated.¹⁹³ Neither practice has ever been deemed unconstitutional. In fact, in *Nguyen v. United States*, although the Court invalidated a Ninth Circuit panel that included a district judge for the Northern Mariana Islands (an Article IV territorial court) who was serving by designation, the Court implicitly acknowledged the validity of Article III judges serving by designation.¹⁹⁴ This proposal would simply extend that practice to the U.S. Supreme Court.

Finally, with regard to the proposal to allow appeals court chief judges to serve as temporary Supreme Court Justices, that scenario raises a slightly more difficult case. Since chief judges represent a distinct class of all circuit judges—and are not currently appointed by the President for that purpose—providing the power to sit temporarily on the Supreme Court has more of a nexus to the principle of guarding against self-aggrandizement by Congress. Yet ultimately the question remains one of germaneness. So long as the new duties—serving periodically on the Supreme Court in place of a recused Justice—are reasonably germane to the existing role of chief judge, the change is constitutionally valid. While this may create a complex scenario, since individuals for the role of chief judge—as opposed to appeals court judge—are not nominated and confirmed under Article II, the proposal ultimately calls for disposing of these issues by making the new office subject to nomination and confirmation. Therefore, there should be no Appointment Clause issue with either proposal.

C. Retired Justices and the Meaning of “Judicial Office”

There remains one final, lingering issue with regard to whether retired Supreme Court Justices can legally serve by designation on the Supreme Court. The question is whether a retired Justice, having formally left the Court, is still constitutionally eligible to serve on the same body to which she was originally appointed. This subtle distinction hinges on the meaning of judicial office in Article III and the retirement statutes. The Constitution declares that Supreme Court Justices “shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”¹⁹⁵ Yet to some, it is unclear whether “offices” and “office” refer to the specific office of Supreme Court Justice or judicial office generally. If they

193. See *supra* Part II.A (discussing the federal designation statutes).

194. See *Nguyen v. United States*, 539 U.S. 69, 77–80 (2003).

195. U.S. CONST. art. III, § 1.

only mean the former—and Supreme Court Justices remained Supreme Court Justices, even in retirement—then the President would never be able to appoint a replacement Justice, since the number of active Justices would never fall below the statutory cap of nine.¹⁹⁶

Thankfully, this issue was resolved in *Booth v. United States*.¹⁹⁷ Considering the question of whether senior judges remain in office under Article III—and if their pay can be reduced—the Court construed the term “office” broadly, concluding that a retired judge (or Justice) retains the “office” for the purposes of pay, even when not hearing cases.¹⁹⁸ *Booth*, therefore, supports the proposition that “office” under Article III means judicial office generally, not the specific position to which a judge or Justice was appointed.¹⁹⁹ In addition to barring Congress from reducing the pay of senior judges, the Court also upheld the practice of Justices riding circuit, deciding lower court cases by way of their broad Article III powers of “judicial office.”²⁰⁰ Today, similar practices are codified in the designation statutes that allow retired Supreme Court Justices to serve on the lower courts—statutes that have never been held unconstitutional.²⁰¹ If retired Supreme Court Justices can serve on lower courts and senior judges can serve on both district and circuit courts, there would seem to be no constitutional distinction in allowing retired Supreme Court Justices to serve on the Supreme Court. Barring actual resignation or impeachment, even retired Supreme Court Justices retain their status as members of the Article III judiciary.

Therefore, whether it be circuit court judges, appellate court chief judges, or retired Supreme Court Justices, this Comment finds no constitutional impediment that would block Congress from enacting a law to allow them to serve on the Supreme Court by designation and assignment. Of course, in one final irony, were this issue to actually arise before the U.S. Supreme Court, it would be the Justices of the Court itself who would decide the issue—even though each Justice would arguably have grounds to recuse on the basis of self-interest.²⁰²

196. See Dorf & McElroy, *supra* note 10, at 19.

197. *Booth v. United States*, 291 U.S. 339, 346 (1934).

198. See Dorf & McElroy, *supra* note 10, at 19 n.93.

199. See *id.*

200. See *id.*

201. See, e.g., 28 U.S.C. § 294 (2006).

202. Ruthann Robson, *Bring Back O'Connor, Souter, and Stevens?*, CONST. L. PROF BLOG (Aug. 10, 2010), <http://lawprofessors.typepad.com/conlaw/2010/08/bring-back-oconnor-souter-and-stevens.html>.

Conclusion

Today, the U.S. Supreme Court stands at a crossroads—its image frequently tarnished by partisan politics and allegations of bias, while at the same time powerless to remedy even the most egregious appearances of conflict of interest due to the lack of any method to replace recused Justices. In a news culture dominated by “gotcha politics”—from the attacks about Justice Thomas’s receipt of lavish gifts and Justice Scalia’s financial conflicts to demands that Justice Kagan recuse herself on any hot-button issue in which the Obama administration held a view—it is time for the Court to rebuild its tarnished reputation. That means taking ethics and recusal seriously.

It also means establishing a way to replace recused Justices. While some may suggest that allowing circuit court judges to serve on the Supreme Court, even in a single case for a single Justice, would undermine the Court’s legitimacy, the opposite seems far more likely. If the Justices of the Supreme Court fail to recuse when necessary, the reputation of the entire Court is damaged. But, if on the other hand, they do recuse—and then deadlock 4-4 on a critical constitutional issue, not only their reputation—but the rule of law itself—may be damaged.

Congress should take the initiative and provide the Supreme Court with the power to right its own ship by enacting a designation statute. Having been battle-tested by most state supreme courts and the entire federal judiciary, the time has come for replacement Justices.